

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE MIDDLE DISTRICT OF TENNESSEE  
3                   AT NASHVILLE

4                   UNITED STATES OF AMERICA,                   )  
5                   Plaintiff,                                    )  
6                   vs.    )  
7                   BRANDON DURELL HARDISON,                )  
8                   Defendant.                                )  
9

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11                   BEFORE THE HONORABLE WAVERLY D. CRENSHAW, JR.  
12                   CHIEF DISTRICT JUDGE

13                   Case No.  
14                   3:17-cr-00124-3

15                   CHIEF JUDGE CRENSHAW

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17                   TRANSCRIPT  
18                   OF  
19                   PROCEEDINGS  
20                   September 30, 2021  
21                   -----  
22                   -----  
23                   APPEARANCES ON THE FOLLOWING PAGE  
24                   -----  
25

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1                   I N D E X  
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45                   Thursday, September 30, 2021  
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910                  INDEX OF WITNESSES  
11                  (None)  
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2510                  INDEX OF EXHIBITS  
11                  (None)  
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1                   The above-styled cause came on to be heard on  
2 September 30, 2021, before the Honorable Waverly D. Crenshaw,  
3 Jr., Chief District Judge, when the following proceedings  
4 were had, to-wit:

5

6                   THE COURT: All right. Be seated. Good morning.

7                   MR. BRUNO: Good morning.

8                   THE COURT: Okay. We're here on Case 17-124,  
9 *United States of America v. Mr. Brandon Durell Hardison*. And  
10 Mr. Hardison is in the courtroom.

11                  If counsel for the government can introduce  
12 themselves on the record.

13                  MR. SCHRADER: Good morning, Your Honor. Ben  
14 Schrader for the United States.

15                  MR. COLLINS: Good morning, Your Honor. Gerald  
16 Collins for the United States.

17                  MR. EVANS: Good morning, Your Honor. Luke Evans  
18 on behalf of Mr. Hardison.

19                  MR. BRUNO: Paul Bruno on behalf of Mr. Hardison  
20 as well.

21                  THE COURT: All right. So we've convened to  
22 conduct the final pretrial conference for the case scheduled  
23 for October the 18th.

24                  I'm going to cover a lot of material, stop at some  
25 point, and so then -- so jot down any questions you have.

1 We're going to start first with jury selection and we'll go  
2 from there.

3 All right. So we'll be ready to bring in the  
4 potential jurors at 9:00 on Monday, October the 18th. Since  
5 the last time that we got together, I made some final edits  
6 and changes to the jury questionnaire, and we then summoned  
7 750 citizens in the Middle District of Tennessee for jury  
8 service. Of the 750 that were summoned, 147 responded.

9 Now, of the 147 that responded, 138 came to the  
10 courthouse and completed the questionnaire.

11 The difference between 750 and those who came  
12 in -- those who responded accounts for -- the big numbers  
13 account for about 230, approximately, that did not respond  
14 to -- to the summons; 330 were excused on statutory basis;  
15 about 50 simply weren't delivered by the Postal Service; and  
16 the remaining number were deferred to another day or service  
17 in the future.

18 And I -- the total number that was summoned -- I'm  
19 sorry -- is 774.

20 So, of the 138 that came in and completed the  
21 questionnaire, we've determined that 93 have indicated  
22 they're available and ready to serve starting October the  
23 18th. They were also told that if for whatever reason the  
24 case is not finished by November the 23rd and bleeds into the  
25 week of Thanksgiving, they were informed that we would be in

1 recess the week of Thanksgiving and will return after that,  
2 if necessary. And they were all still available to serve.

3 So, based on other cases and -- and the prior case  
4 connected to this, related to this one, I do believe we can  
5 get a fair and impartial, unbiased jury from those 93. And  
6 the Court's preference would be to call those 93 in to -- to  
7 appear here in the courthouse on the 18th of October at 9:00.

8 For those who have a conflict, which would be the  
9 difference between -- in the numbers I've already given you,  
10 what I would propose, as we did before, that I'm going to  
11 provide to you all at noon on October the 1st a CD that  
12 contains the names of those -- that contains -- identifies  
13 those jurors who have a conflict. You all can then review  
14 the questionnaires, confirm their conflict, and let me know  
15 by 9:00 on October the 5th, by filing a notice, whether you  
16 agree to proceed with those jurors who do not have a  
17 conflict, the 93, or do we need to have -- have -- require  
18 those who have a conflict to be summoned.

19 Again, I anticipate, after you review the  
20 questionnaires, that you'll agree that those with conflicts  
21 need not appear on the 18th, and they'll be excused, and the  
22 only ones that will come for jury service will be the 93.

23 So, again, at 9:00 on October the 5th, you'll file  
24 a notice agreeing -- or not, but I suspect agreeing -- to  
25 proceed with those that have no conflict, the 93. I'm

1 sorry -- the 100- -- the 93 that have no conflict.

2                   Then on -- at noon on Friday, October the 8th,  
3 we'll give you a CD with the redacted questionnaires for the  
4 93 that have no conflict. The CD must not be copied,  
5 printed, or otherwise duplicated. You'll each get one CD,  
6 and you're free to take notes based on the information on the  
7 CD. The CD needs to be returned to the Court immediately  
8 after jury selection on the 18th.

9                   What you receive on Friday, October the 8th, will  
10 not contain the name or address or employment of the  
11 prospective jurors. That will be provided to counsel at 9:00  
12 on October the 14th. This is what I call the jury key. It  
13 is for counsel's eyes only. It's not to be shared, absent  
14 Court permission. And, again, the jury key will be returned  
15 to the Court immediately following completion of jury  
16 selection on the 18th.

17                  As we'll get into in a minute, at all times during  
18 the jury selection process, prospective jurors will be  
19 referred to by number. I've already granted the motion for  
20 an anonymous jury and, consistent with that, the information  
21 you receive will identify jurors by number. That includes  
22 the information on their completed questionnaires. You'll be  
23 able to match them later as trial draws closer with the jury  
24 key. And during voir dire you'll refer to each juror by  
25 number and in no instance will any names be used.

1                   So, by way of example, if there is a potential  
2 juror who is a nurse, say works at Vanderbilt, you can ask  
3 him or her about their employment, without getting into the  
4 specifics about exactly where. "Ma'am, sir, you're a nurse?  
5 You live" -- you'll know then they live in Brentwood. And if  
6 there's any particular questions you want to ask -- but it  
7 would be no reason to refer to their specific place of  
8 employment, that being Vanderbilt.

9                   As we've done in other trials, the jury's going to  
10 remain together throughout the day. They'll be taking their  
11 breaks in the jury assembly room, which has a restroom and a  
12 full kitchen. The jurors will be entering and exiting the  
13 building in an entrance that's separate from that used by the  
14 general public.

15                  We've also provided for them to have designated  
16 offsite parking during the course of the trial. There will  
17 be secondary screening at the entrance of the courtroom.

18                  All cell phones will be collected at the entrance  
19 of the courtroom and available to -- to persons when you  
20 exit -- when you leave the courtroom. That includes everyone  
21 except counsel of record only. But counsel needs to make  
22 sure that's on silent and limited use.

23                  Public -- members of the public will not be  
24 allowed to bring in cell phones, or anyone else who is not  
25 counsel of record. Also, because of persistent issues, I'm

1 going to order the marshal to make sure that he reminds  
2 deputy marshals and court security officers who are assigned  
3 to this case to maintain the highest level of professionalism  
4 throughout the trial. For example, I should not observe  
5 deputy marshals or court security officers constantly on  
6 their cell phones for ten, 15, and even 30 minutes, as has  
7 become somewhat the custom here. And the marshals certifying  
8 that's been done by October the 8th.

9                   Also, by October the 8th, you're going to provide  
10 me an agreed statement that explains to the jury why certain  
11 precautions are being taken. For example, so that jurors are  
12 not contacted by the media and to ensure that information  
13 about their private lives is not exposed to the media. And  
14 that will be due on October the 8th.

15                   So, when you come in in the morning of the 18th,  
16 we'll have done the random selection. You'll have on your  
17 desks a copy of the proposed -- you'll have on your desk a  
18 seating chart of the random selection, by number. You'll  
19 have the questionnaires. You'll have the key to make the  
20 connection for any questions that you want to ask.

21                   I'm pretty sure we're going to conduct the voir  
22 dire in a different courtroom.

23                   Correct? Yeah.

24                   And that will be for attorneys, the government  
25 representative, Mr. Hardison, and his lawyers. And the rest

1 of the courtroom is going to be full.

2 I anticipate that the first -- when we start at  
3 9:00 on the 18th, we'll have 56 of the 93 jurors in the room.  
4 And you'll have a chart for those 56. Because we're going to  
5 voir dire them all at once. If past practice is a guide, we  
6 were able to get a jury, 12 -- 12 jurors, plus six  
7 alternates -- that's the limit I can do under the rules --  
8 from that 56. Because that will give us, I think, about 22  
9 to excuse for cause. And, again, we know they're available.

10 So you all and the Court will go right into  
11 anything about these particular jurors that might render them  
12 problematic to serve. I'm going to allow an hour for each  
13 side for voir dire. I do require that voir dire be strictly  
14 follow-up or strictly questions that go to whether or not  
15 this particular juror has any bias or prejudice or in some  
16 way is unfit to serve. I'm not going to allow the voir dire  
17 to be a beginning of your opening statement.

18 So let me just -- I know Mr. Schrader has done a  
19 case. My memory tells me that Mr. Evans has. But I'm not --  
20 I can't call it up. I just know it's there.

21 MR. EVANS: Yes, Your Honor. Marquis Brandon.

22 THE COURT: But, Mr. Bruno, I don't think you  
23 have.

24 MR. BRUNO: We actually -- with Larry Arnkoff and  
25 I, we actually -- Rodrecus Smith, we selected the jury and

1 started the proof, and then the case resolved. So I think  
2 we've done one jury selection.

3 THE COURT: Okay. Well, we're going to do it the  
4 same way here, except with all the COVID provisions.

5 Once we have the jury, you see the setup that we  
6 have currently in the courtroom. You'll do everything from  
7 your -- from your desk and from the podium; "everything"  
8 being opening, direct, cross, closing, objections. There  
9 will never be a reason for you to leave your desk or the  
10 podium on your desk. Everything will be there. All the  
11 exhibits will be done electronically in that they need to be  
12 on your laptop or whatnot so you can punch the button and  
13 show it on the screen.

14 That doesn't preclude you from sharing with the  
15 jury particular exhibits that you think -- documents that you  
16 want them to have a copy of. Once in evidence, that can be  
17 done. But we need to -- those will be distributed by the  
18 court security officer, who will have on gloves and make sure  
19 that we don't endanger the jury by giving them a particular  
20 document.

21 The witness will need a witness -- an exhibit  
22 book -- exhibit notebook. The Court's going to need three  
23 exhibits -- hard copies of exhibits, and plus one on your CD.  
24 Obviously, the other -- your opponent will need a copy, if  
25 they don't already have some knowledge about what exhibits

1 you're going to call -- you're using.

2 We're not going to have any bench conferences.

3 And the way we're going to handle that is that I'll be  
4 available in the mornings at 8:30; I'll be available for the  
5 lunch break, but that's limited to 30 minutes; and then all  
6 of the issues really need to be addressed at 4:30 when we  
7 conclude for the day. The jury will leave, and then we'll  
8 take up any evidentiary issues you anticipate.

9 Because I'm going to ask the government to provide  
10 a rolling list of five witnesses so that the defense is ready  
11 to proceed, and we can have our 4:30 meeting and it be  
12 productive. I recognize we're going to be in trial for a  
13 while. I recognize you've got a lot to do and to handle.  
14 But we do need to make use of the time at 4:30 for any  
15 evidentiary issues so those can be ruled upon and you can  
16 prepare for the next day.

17 However, in those rare instances -- if there's  
18 some uncertainty about a witness or two, make sure that the  
19 defense has that list no later than 8:00 the night before the  
20 following trial day.

21 So, again, we can't do bench conferences because  
22 of COVID. If there really is an exigent circumstance that we  
23 need to talk, we will have to excuse the jury and either do  
24 it here in the courtroom, or we'll have to retire to chambers  
25 with the court reporter.

1           If we retire to chambers and take it up, then the  
2 Court will ensure that the Realtime that -- that we engage in  
3 in chambers plays in the courtroom so Mr. Hardison can read  
4 what is being discussed. Because we'll have only attorneys  
5 in the -- but Mr. Hardison will be able to follow exactly  
6 what everyone is saying.

7           Obviously, we're not going to have a lot of time  
8 in the morning. So that's going to have to be very short,  
9 very pithy. Because I want everyone here by 8:50 so we can  
10 start promptly at 9:00. If it's something that's going to  
11 take more than a couple minutes to discuss, I'm going to just  
12 defer that, call the next witness, and let's move on. We've  
13 got -- we'll have to put that off until we have more time to  
14 discuss it.

15           So -- and that's -- the same is true at lunch.  
16 4:30 is the time we're going to take up really substantive  
17 things to keep the case moving the next day.

18           So the government will provide a rolling list of  
19 the witnesses, as well as identification of what exhibits for  
20 that witness, for the next five witnesses. If for whatever  
21 reason the government needs to call a witness out of order,  
22 please give the Court and the defense advance notice of that  
23 so the Court and defense can prepare.

24           I pull all the exhibits the night before -- or,  
25 rather, the courtroom deputy pulls them. So I'll have my

1 files of the five witnesses and the rolling list and the  
2 exhibits. If you call somebody that's not in that list, I'm  
3 not going to have the exhibits, and that's going to cause  
4 delay. And I'll probably just say, "Let's skip that person  
5 and go to the next. Let's keep moving."

6 So the Court does expect all counsel to be present  
7 every day and all day. If you have a competing matter, try  
8 to schedule that on Friday, because we'll only go Monday  
9 through Thursday in trial. Fridays will be the day that  
10 we're not in -- we'll be in recess and you can take care of  
11 your other cases.

12 Jurors are going to be provided lunch at the --  
13 the Court can do so under statute. So their lunches will be  
14 ready as soon as we recess for lunch. They can eat it in 30  
15 minutes, and then we'll be ready to start back. Anticipate  
16 lunch sometime around 12:15 to 12:45, give or take. You  
17 know, if we have a witness that we're about to wrap up, I'm  
18 going to try to wrap up that witness and then take lunch.

19 The defense will have, of course, 10 peremptory  
20 challenges. The government has six by statute -- by rule.  
21 Of the 93 people who have been -- who have completed the  
22 questionnaire and are available to serve, the Court has asked  
23 the jury administrator to give me demographics. I've  
24 received that information, and the Court has reviewed it. I  
25 do believe the 93 people who are going to be summoned on

1 October the 18th represents a fair cross section of the  
2 community in all respects, including racial composition. All  
3 total, 22 percent of the 93 are minority, which, to the  
4 Court's knowledge, actually exceeds the percentage in the  
5 Middle District of Tennessee. Specifically -- and I'm  
6 talking about all 30 -- 33 -- 33 to 34 counties in the Middle  
7 District. And, in particular, it appears about 14 percent  
8 are African-American, which, again, is right at what I think  
9 we have in the Middle District. So, again, the Court  
10 believes that the 93 who are qualified with no conflict  
11 represents a fair cross section in all respects of the  
12 district.

13               Okay. I'm going to stop here because I think I've  
14 covered issues having to do with the jury pool, voir dire,  
15 how we're going to handle the jury.

16               And, obviously, we've got a lot more to talk  
17 about, but with things regarding the jury, does the  
18 government have any questions?

19               MR. SCHRADER: I do, Your Honor. Just a few  
20 questions and a couple of requests.

21               First of all, I appreciate the Court putting time  
22 and thought into this process. It's complicated, and  
23 particularly in a case like this, and COVID hasn't made  
24 things any easier for anybody.

25               With respect, first, to physical exhibits, there

1 are some physical exhibits the Court has. If we intend to  
2 use those on a given day, should we just notify Ms. Parise  
3 the day before?

4 THE COURT: And/or Ms. Kincaid.

5 MR. SCHRADER: Okay.

6 With respect to cell phones, Ms. Helton, our case  
7 paralegal, and Agent Rundle, our lead case agent, are often  
8 in trial coordinating logistics in order to make sure things  
9 are smooth here in the courtroom. So they may be  
10 coordinating, for example, with other agents who are sort of  
11 shepherding witnesses around various parts of the courthouse  
12 so that they're here when they're supposed to be to testify.

13 So my request is that Ms. Helton and Agent Rundle  
14 also be permitted to use their cell phones, really for that  
15 purpose, so that they can text message --

16 THE COURT: Well, they can use it. It will be  
17 right outside the door. They can certainly do that during  
18 breaks and lunch and whatnot.

19 MR. SCHRADER: But I think the issue is -- you  
20 know, a witness will be done, and the Court will say, "Call  
21 your next witness," and we want to make sure that witness is  
22 there. And --

23 THE COURT: Here in the courthouse?

24 MR. SCHRADER: No. In other words, is outside and  
25 is ready to go when -- when the witness who was testifying is

1 done.

2                   In order to make sure that happens, for example,  
3 Ms. Helton may be communicating with staff in the U.S.  
4 Attorney's office or Agent Rundle may be contacting other  
5 agents who are with a witness in another part of the  
6 courthouse. And so they're just making sure that those folks  
7 are here so that there are no delays between witnesses.

8                   Because if -- the alternative is agents will have  
9 to step out and then text whoever is with a witness, and then  
10 that witness will have to come down. I think they can do it  
11 unobtrusively. They did that last trial, too.

12                  THE COURT: Yeah. I mean, you're going to have  
13 your five witnesses and then -- I mean, you can do it however  
14 you want, but you know how you're going to call them. You  
15 can tell the first three, "Be here at 9:00," and we know  
16 they're here. Then the next ones in the afternoon, "Be here  
17 at 1:00," and -- be here. I don't mind the lawyers having  
18 their cell phones, although that privilege could be revoked  
19 as it was in the first trial for a couple of lawyers. But I  
20 think when I start spreading it out I just run a risk.

21                  Let's just try it that way. And, if it really  
22 becomes a problem, then I'll be glad to revisit it.

23                  MR. SCHRADER: I can tell the Court, I don't use  
24 my cell phone during trial. I think it's distracting. But  
25 part of the reason I don't have to use it at all is because I

1 have folks like Ms. Helton and Agent Rundle who can be  
2 texting agents and getting folks here. So --

3 THE COURT: Well, let's just have them here at  
4 9:00 and at 1:00, and we know they're here. And then  
5 Ms. Helton can provide you the help you need.

6 MR. SCHRADER: I take it Ms. Helton and Agent  
7 Rundle can access their computers during the trial? They'll  
8 have those here?

9 THE COURT: Sure. And look like the defense has  
10 computers, too -- yeah.

11 MR. EVANS: Oh, no, not confused at all.

12 THE COURT: No. You have one right there.

13 MR. BRUNO: You have a computer.

14 MR. EVANS: Oh, computer. Oh, yes.

15 THE COURT: Sure.

16 MR. SCHRADER: So that -- I mean, that would be  
17 one way to solve that problem.

18 THE COURT: Okay. What else?

19 MR. SCHRADER: Just as sort out of curiosity, does  
20 the Court know what percentage of folks in the 93 have been  
21 vaccinated? Or have some sort of COVID immunity?

22 THE COURT: I don't know that as we're here today.

23 MR. SCHRADER: Okay. And then, I don't know if  
24 the Court will entertain this, but 30 minutes is -- is hard  
25 for lunch, particularly in a lengthy trial. I know 45

1 minutes was hard in the Darden trial. I would like 45  
2 minutes again. I know that everyone wants to get this case  
3 done quickly, but there a lot of things that happen over a  
4 lunch break. And those things don't always include eating,  
5 frankly. So my request --

6 THE COURT: Yeah. I'm going to stay with 30  
7 because it's worked so well in the civil cases and it worked  
8 well in the Orusa case. Let's try it. If it really becomes  
9 a problem, then we can revisit it. But it's worked so well.  
10 It keeps people focused. It keeps them here. I don't lose  
11 them. And we get back to work. We get back to work. So  
12 let's try 30 minutes and see how it works.

13 MR. SCHRADER: I'll let the Court know if I'm  
14 having trouble.

15 THE COURT: Now, separately from that, I know the  
16 Clerk's going to be in communication with the marshal to make  
17 sure provisions are made for Mr. Hardison both at lunch and  
18 otherwise, since he'll be out of the regular loop for  
19 provisions.

20 MR. SCHRADER: Can I have just one moment, Your  
21 Honor?

22 THE COURT: Sure.

23 MR. SCHRADER: Two questions from Ms. Helton.

24 The first relates to the jury questionnaires. We  
25 like to print them out and make notes on them, kind of as

1 we're discussing that.

2                   Can we do that as long as we return those  
3 materials to the Court?

4                   THE COURT: No. You can look at the CD, and you  
5 can make notes from what you're looking at. But you can't  
6 print it out.

7                   MR. SCHRADER: Okay. And then -- what was the  
8 other question? Oh, that's right.

9                   So the exhibits themselves are -- the electronic  
10 versions of them are too large to fit on CDs. So can we  
11 provide them to the Court on a thumb drive?

12                  THE COURT: Sure.

13                  MR. SCHRADER: Thank you, Your Honor.

14                  THE COURT: And you all need to do that jointly so  
15 that -- and at some point you need to merge the defense  
16 exhibits. Because that thumb drive will go back into the  
17 jury room, and I'll ask one of the jury to select one of  
18 their number to control the computer so we don't have  
19 multiple people touching the same thing.

20                  And, just so it's clear, I'm not aware the Court  
21 has any authority to make the jurors be vaccinated. So we'll  
22 probably have vaccinated and unvaccinated. Although I will  
23 tell you, as things have progressed, the percentage of people  
24 who come vaccinated is growing every time. I think I've had  
25 one jury for sure that was 100 percent vaccinated, and then

1 another two juries that had, like, one person who wasn't.  
2 Maybe two that wasn't. So that's been encouraging.

3 MR. SCHRADER: Ms. Helton just wants to know, in  
4 terms of that thumb drive containing exhibits, the Court  
5 wants all of the government's exhibits? In other words, all  
6 the ones that are marked?

7 THE COURT: All the ones that are going to go back  
8 to the jury.

9 MR. SCHRADER: Oh, okay. At the end of the trial.

10 THE COURT: Right. You're going to need your  
11 respective exhibits on your computer.

12 MR. SCHRADER: Sure.

13 THE COURT: So you can punch it and show it to the  
14 jury.

15 MR. SCHRADER: Understood. Thank you, Your Honor.

16 THE COURT: All right. Questions from --  
17 Mr. Bruno?

18 MR. BRUNO: Just briefly, Your Honor.

19 I understand that we'll voir dire -- I guess are  
20 we going to voir dire all 56?

21 THE COURT: Yes.

22 MR. BRUNO: At the same time?

23 THE COURT: Yes.

24 MR. BRUNO: And then, on cause challenges, you'll  
25 take that first?

1                   THE COURT: Sure. Good. All right. Let me go  
2 through that.

3                   MR. BRUNO: Okay.

4                   THE COURT: I guess we haven't done that.

5                   So what we do there -- again, no bench  
6 conferences. Ordinarily I would bring the juror up to the  
7 bench and we'll talk. So the way we'll do that is, as we're  
8 going through voir dire, I'll do mine, you'll do yours, and  
9 we'll be done with all the questioning.

10                  As we go through voir dire and we find out that  
11 Juror Number 9 wants to talk or we need to talk with Juror  
12 Number 9 individually, then I'll call them back into  
13 chambers. And we're going to be -- Judge Richardson -- I  
14 think we're going to be in Judge Richardson or Judge  
15 Trauger -- Judge Trauger?

16                  MS. KINCAID: It hasn't been determined yet. Most  
17 likely Judge Richardson's.

18                  THE COURT: Okay. If it's Judge Richardson, he  
19 has a really expansive conference room that's very private.  
20 And we went back there with a court reporter, the juror,  
21 space, and partitions for the lawyers. And we'll just call  
22 them back while we're back there. So I'll make a running  
23 list of which jurors we'll need to talk to individually, or  
24 which jurors have asked to talk to us individually, because  
25 I'll afford them the opportunity not to share private

1 information in public. And we'll do that back in chambers.  
2 And that's worked pretty well, too.

3 Go ahead.

4 MR. BRUNO: So, when we exercise cause  
5 challenges --

6 THE COURT: Okay. When we finish talking to all  
7 the folks in the jury room individually, then I'll go ahead  
8 and we'll do our for cause right then and there. And then  
9 you can mark your lists. The first 12 will be the jury, and  
10 then the next six will be alternates in the order that  
11 they're selected. So we'll know who Alternate Number 1 is,  
12 Alternate Number 2, Alternate Number 3.

13 MR. BRUNO: Along those lines, when we submit our  
14 cause challenges, those people are removed --

15 THE COURT: On your list. We'll strike them.

16 MR. BRUNO: Okay. You strike those.

17 So then we have ten and they have six on  
18 peremptories.

19 Do you require us to do one -- exercise all up to  
20 ten at that point in time, or do we get back --

21 THE COURT: Oh, no back striking. You'll exercise  
22 them in the blind all at once.

23 MR. BRUNO: All at one time. Okay. And then --  
24 so we have ten, and then we have six alternates.

25 THE COURT: And you get an additional three for

1 alternates.

2 MR. BRUNO: And we'll just do that -- after we  
3 have the 12, then we'll do an additional three.

4 THE COURT: Right.

5 MR. BRUNO: Okay.

6 THE COURT: So we'll do the for cause back in  
7 chambers; then I'll give you a few minutes to do your  
8 peremptory; you'll send me back the lists; I'll make those  
9 strikes; then I'll call you back and say, "Okay, here's your  
10 12. Now exercise your three peremptory on the alternates."

11 Done. The first six are going to be the alternates.

12 MR. BRUNO: I understand. Thank you.

13 THE COURT: And I don't tell the alternates  
14 they're alternates until the end of the case.

15 MR. BRUNO: Thank you.

16 THE COURT: All right.

17 MR. EVANS: Nothing further, Your Honor. Thank  
18 you.

19 THE COURT: Any new questions come up from the  
20 government?

21 MR. SCHRADER: No, Your Honor.

22 THE COURT: All right. Anything that the jury  
23 administrator wants to bring forward that I didn't --

24 MS. KNOCH: No. You covered it.

25 THE COURT: Ms. Kincaid?

1 MS. KINKADE: No, Your Honor.

2 THE COURT: All right. Y'all are free to go, and  
3 we will march on.

4 So let's come back here now. I want you all to be  
5 sure, and especially the government here, I need an  
6 alphabetized witness list from both parties on August -- I'm  
7 sorry -- October the 8th. It can be filed under seal. I  
8 need a brief one- to two- to three-sentence summary of the  
9 testimony anticipated from each witness so I can understand  
10 how that witness is going to fit into the case. Obviously  
11 that doesn't apply to impeachment witnesses.

12 Exhibit lists will also be due October 8th. Each  
13 will be numbered sequentially, without exception, and we'll  
14 never run out of a number. So we don't do 10Aiii. We don't  
15 do that. Every exhibit will have its own number. And  
16 Mr. Koshy taught me the importance of that. I need one -- I  
17 need the original and three copies of the exhibits in a  
18 three-ring binder by October the 15th, as well as one CD  
19 containing all the exhibits.

20 You all have provided me a joint summary of the  
21 case that I find acceptable and fair. I am going to read  
22 that to the jury during my voir dire to provide context for  
23 questions.

24 Also, for the final -- also, for the final trial  
25 jury, they'll get a Redweld with a notebook for -- for them

1 to take notes, a pen for them to write notes, and they will  
2 get a copy of your joint summary of the case.

3 Any -- does the government have any objections to  
4 that?

5 MR. SCHRADER: No, Your Honor.

6 THE COURT: The defense?

7 MR. EVANS: No objection.

8 THE COURT: And, just as a reminder, they'll leave  
9 that here in the courtroom at the end of every day in their  
10 seats, and it will be very safe until the next day.

11 That will also be the folder they use for any  
12 documents that you all want them to have their own copy of,  
13 for whatever reason.

14 So I don't anticipate reading the fourth  
15 superseding indictment that at trial we'll refer to only as  
16 "the indictment." And even in the -- we'll certainly provide  
17 them a copy, and I know we have a motion related to that, but  
18 I'll use that as well -- I'll provide them a copy, but use  
19 your summary in the final charge.

20 As you all already know, I'll just remind you,  
21 there will be no use of any foul, profane, expletives or any  
22 such other locker room, alley kind of banter or words. If  
23 such a word needs to be used, then it should be spelled into  
24 the record, you know, s-h-i-t, and thereafter referred to as  
25 "the S word" or whatever word it is by the first letter. I

1 think we'll all know what it means.

2 I appreciate it may be necessary for some of the  
3 witnesses to refer to Mr. Hardison or other witnesses by a  
4 nickname. That needs to be kept to a minimum. I ask that  
5 all witnesses be referred to as, you know, Mr. Johnson,  
6 Mr. Smith, Ms. or Mrs., as the case may be.

7 With regards to transcripts, you do need to make  
8 your arrangements, but the Court will allow you to cite from  
9 a rough transcript for purposes of any arguments to be made  
10 during the course of the trial. But, if the counsel believes  
11 they need an official, I'll certainly approve any CJA  
12 reimbursement for that.

13 You all have given me some jury instructions. And  
14 perhaps I wasn't as clear as I need to be right now. I do  
15 want you all to meet and discuss that in person and give it  
16 another try. And to help you in that -- and I want that done  
17 by October the 8th at noon, new jury instructions and verdict  
18 form.

19 I have two copies of the jury charge in Orusa.  
20 I've changed it since y'all were last here, in some of the  
21 general language I've changed. I've also changed my  
22 instruction on implicit bias. So that's the most recent  
23 version.

24 Again, I would suggest meet in person, go over it,  
25 and see if you can't reach agreement on most of that. Go

1 back to the Darden instructions and use that as the template,  
2 which I think there was some attempt to do. And then add  
3 anything that -- you know, a special request, because of a  
4 certain witness, if we're going to have a -- a witness  
5 testifying who is addicted or whatnot, then you may want to  
6 suggest a special instruction on that. And the verdict form,  
7 too.

8           But I do think you go back to the Darden ones, and  
9 then -- my approach is going to be that's sort of the --  
10 that's a very good template. If we vary from that, I'm going  
11 to need to know why. Now, I'm not saying I'm not. But --  
12 and if you all agree we need to vary, that's all the better.  
13 But use that as the template, a pretty strong template. And  
14 my approach is going to be, why do we need that here? Why do  
15 we need something in addition? I think we want to keep  
16 everything we had. So the question is only going to be what  
17 we may want to add to it.

18           But, in any case, your new proposed jury  
19 instructions and verdict form will be due noon on October the  
20 8th, after you've met in person and had a substantive, good  
21 faith, professional discussion.

22           And then -- well, then I'll -- oh, provide those  
23 to me on a CD -- no. Provide those -- I'm sorry. Provide  
24 those to me in Word version. Word version. And it makes it  
25 easier for me to make my changes.

1           If you all have any COVID questions -- oh, this  
2 goes back to jury. I'll only ask the COVID questions so as  
3 to not allow either party to curry favor with the jury. So,  
4 if you've got a particular COVID question you want me to ask,  
5 then you need to provide that to me by noon on October the  
6 8th.

7           So, in order to do that, you probably want a  
8 summary of what COVID questions I generally ask. And what I  
9 generally do is I will -- I'll tell them that -- you know,  
10 there's signage on the eighth floor requiring masks to be  
11 worn at all times. That temperature checks will occur for  
12 them and all parties and everyone in the courtroom on a daily  
13 basis. You'll each have a little dot that tells me that your  
14 temperature and your oxygen level is correct. This includes  
15 any witnesses.

16           Another reason for you to have all your witnesses  
17 here in the morning, because we'll have a nurse here to take  
18 their temperature check and oxygen levels and get their  
19 colored dot. And then, if witnesses come in the afternoon,  
20 they're going to need to go to the Clerk's office to be  
21 checked and get their clearance that they're good to come  
22 into the courtroom.

23           They'll be asked questions, as well as you all  
24 will be every day. I'll tell them that we've created  
25 protocols for their safety. I'll tell them that, since we

1 started back doing jury trials, I think since June of 2020,  
2 to our knowledge no juror has -- no juror has gotten sick by  
3 virtue of their service.

4 I'll tell them that they'll get a safety bag that  
5 contains hand sanitizer, more masks, wipes, all sorts of  
6 things for their safety. The courtroom will be cleaned as  
7 needed throughout the course of the trial. I'll share with  
8 them as well that we've had a medical professional engaged to  
9 help us with recommendations. I'll share with them a summary  
10 that we recently met with Dr. Hildreth, the President of  
11 Meharry Medical College, who gave us -- who advises this  
12 President and the prior President, and he gave us a sobering  
13 report about what he expects, and that we've made provisions  
14 to -- and we continue to address every day, changing our  
15 protocol to protect the lawyers, the parties, the public, and  
16 the court staff.

17 I did a video that I think I told you about. I  
18 don't think y'all had a chance to see it. But I know during  
19 the video I directly address COVID-19, and I did a little  
20 summary there about some of the things the Court has done and  
21 it will continue to do. So when they came in to complete the  
22 questionnaire -- COVID is on everybody's mind -- they  
23 received some information there. I think when they received  
24 their summons, they also maybe got a letter from me about the  
25 pandemic and the things that we're doing.

1           They've been asked repeatedly -- when they came in  
2 to do the questionnaire, when they come in on the 18th -- a  
3 series of questions about any flu-like symptoms, have you  
4 traveled outside of the United States, have you been in  
5 contact with anyone that's been diagnosed, are you a health  
6 care worker? Anyone who is sick, been around anyone --  
7 anyone who has experienced -- experiencing COVID-19 symptoms,  
8 anyone who is living with somebody who is currently having  
9 COVID-19 issues, or anyone who asserts that their health  
10 might be -- that they have some underlying medical issues  
11 that might put them peculiarly at risk are quickly excused.

12           So anyone who has any -- we excused them right off  
13 the bat. And there is our challenge in this case. Because  
14 the -- you know, the jurors who are selected are going to be  
15 living their normal lives, although I will ask them to  
16 exercise some caution now that they're judges of the facts in  
17 this case. They can't engage in the same activity that they  
18 did. So just -- all I can do is urge caution, restraint on  
19 the weekend, and what they do, please, please, they're very  
20 important people to the Court, and I -- I ask them just to  
21 defer a little bit of their extracurricular activities so  
22 they can perform their service.

23           Obviously we'll do social distancing. I think  
24 I've told you, they'll be in the jury assembly room. We try  
25 to get them in and out of the courtroom without touching

1 things or doors and whatnot.

2                   So that's sort of a -- that's a summary of all the  
3 things we do. And I'll share some of those. So, if there's  
4 particular COVID questions you all want me to ask, then go  
5 ahead and give me those questions by noon on October the 8th.  
6 I'll go through them and use them. Obviously, at 4:30, we'll  
7 take up any substantive evidentiary issues or things that we  
8 need to have clarity. That doesn't prohibit either side from  
9 making your general objections -- objection, hearsay, or lack  
10 of foundation -- that's -- all that's fair game and you can  
11 continue to do that.

12                   I guess for -- I can't remember your co-counsel's  
13 name.

14                   MR. SCHRADER: Mr. Collins.

15                   THE COURT: Mr. Collins.

16                   So, Mr. Collins, I do -- if you object, that's  
17 your witness. So be careful what witnesses you object to.  
18 Only one attorney per witness during the trial.

19                   Oh, who's the government representative going to  
20 be? For trial?

21                   MR. SCHRADER: What's the --

22                   THE COURT: Government's representative at trial.

23                   MR. SCHRADER: I'm not sure what that means  
24 exactly, Your Honor. Oh, I'm sorry. The case agent who will  
25 be here? Agent Rundle, Jake Rundle.

1                   THE COURT: So, Mr. Rundle, you need to be here  
2 every day, all day. You're not excused unless I excuse you.

3                   AGENT RUNDLE: Yes, sir.

4                   THE COURT: Opening statements will be limited to  
5 one hour.

6                   You all have had a case with me and you had no  
7 problems, but I'll say this one more time -- perhaps  
8 sometimes I'm not clear -- if you're going to use a  
9 demonstrative exhibit at trial, show it to the other side.  
10 So if you're going to use this red pen as a demonstrative,  
11 show it to Mr. Schrader, Mr. Bruno, and get him to agree, no  
12 objections to the use.

13                   Mr. Schrader, if you're going to use a blue pen,  
14 whatever the demonstrative is, show that to the other side,  
15 and then file with me on noon on October the 8th that I've --  
16 "I have disclosed to the other side all demonstratives to be  
17 used during the opening, and I hereby certify to the Court  
18 there are no objections to the use of the demonstratives."

19                   Is that -- is that clear?

20                   MR. EVANS: Yes, Your Honor.

21                   MR. BRUNO: Yes, Your Honor.

22                   MR. SCHRADER: Yes, Your Honor.

23                   THE COURT: Okay. Okay. Let's just keep  
24 everything noon on October the 8th.

25                   Be -- please familiarize yourself one more time

1 with the evidence presenter. You can put a document on the  
2 presenter. You can enlarge it. And that is the one constant  
3 feedback I get from the jurors: Why don't the lawyers know  
4 how to use the evidence presenter? Why don't the lawyers  
5 enlarge it so we can read it?

6                   And then the other constant complaint is, given  
7 all the time the lawyers had, when they punch the button to  
8 play the video, why wasn't it ready to go?

9                   And I don't have a good answer for that because I  
10 tell them, "At the pretrial conference, I told them all these  
11 things," and, yet, we have problems. So just be sure you  
12 know how to enlarge the exhibit.

13                   Now, all the jurors I've had are very diligent.  
14 Now, they are following the evidence very closely. They --  
15 they're not taking what you all say as gospel. They want to  
16 see it for themselves. And that includes documents. And,  
17 also, they all seem to expect, rightfully, some level of  
18 professionalism.

19                   So you know this video's coming. You've talked  
20 about it in your opening. And yet, when you hit the button,  
21 we all sit here looking at each other because it doesn't  
22 work. So just be sure you know how to use the material.

23                   And same thing with use of your -- of the  
24 lavalier, microphone. Be sure it's working so we can hear.  
25 It makes a big difference in whether you can hear something

1 or not.

2           If there is any media coverage here, remind  
3 yourselves of the local rule.

4           Okay. I think I'll stop again before I go to my  
5 next list.

6           Any questions about anything that we've discussed  
7 so far? Mr. Schrader?

8           MR. SCHRADER: Yes, Your Honor.

9           First, on the witness list, my recollection of the  
10 scheduling order was that that was originally due on  
11 October 4th. Is this a new date, then, for when it's due?  
12 Okay.

13           THE COURT: But you're free to file it on  
14 October 4th. I'm just saying I need it no later than the  
15 8th.

16           MR. SCHRADER: I'm happy to wait.

17           So what I've done in this case, for the witness  
18 list, is -- it's lengthy. But there were really about 50  
19 witnesses or so that I have a high degree of confidence we're  
20 going to be calling.

21           I also have a high degree of confidence that we're  
22 almost certainly not calling the people who are not in that  
23 category.

24           So the witness list that I prepared has two  
25 categories, both alphabetized. The first is witnesses the

1 government is likely to call at trial.

2 THE COURT: So you have a will call list?

3 MR. SCHRADER: Yes.

4 THE COURT: And then you have a may call list?

5 MR. SCHRADER: Exactly. And that's really for --  
6 to help the Court and also defense counsel sort of know where  
7 to focus in terms of who it is the government's going to be  
8 calling.

9 So that's the way I've currently structured it. I  
10 could just remove those categories and just make everything  
11 one long alphabetical list, but I think it might be helpful,  
12 frankly, for folks to know who it is we're likely to call in  
13 this case and who we're not.

14 THE COURT: I agree.

15 MR. SCHRADER: So I'll plan on filing it that way.

16 THE COURT: But now I still need that two- to  
17 three-sentence summary of the amended testimony.

18 MR. SCHRADER: And that's included in the  
19 government's witness list.

20 THE COURT: In the witness list? Yeah. In the  
21 witness list.

22 MR. SCHRADER: And that's what I'm referring to.

23 THE COURT: All right.

24 MR. SCHRADER: On the jury instructions, we -- we  
25 actually met with defense counsel yesterday for a couple of

1 hours to talk about --

2 THE COURT: And I meant to note that. I read  
3 that. So I thank you all for planning that.

4 MR. SCHRADER: Because there were issues we were  
5 able to work out. Some stipulations we'll be able to agree  
6 to to try to move things along in this trial.

7 THE COURT: So let's do any stipulations by --  
8 let's do any stipulations by 9:00 on October the 15th.

9 MR. SCHRADER: Yes, sir.

10 One of the things we talked about was jury  
11 instructions. And I can tell you that we -- meaning the  
12 government -- went back to the Darden instructions and sort  
13 of started there. But, as the Court may recall from the last  
14 trial, we had filed a set of proposed jury instructions at  
15 the beginning. And we had some objections to the  
16 instructions that were ultimately issued in that case.

17 So I'm -- we're always happy to talk with defense  
18 counsel about whether there is sort of common ground that we  
19 can reach. But, at the end of the day, I don't know that  
20 we're going to see eye to eye, necessarily, on -- with the  
21 Court about what the instructions for this case ought to look  
22 like.

23 So what we filed here were, as advocates, what we  
24 believe the jury instructions ought to be in the Hardison  
25 case.

1                   THE COURT: Yeah. And I think we addressed the  
2 same issues in Darden. I do specifically recall it came down  
3 to one charge and some wording, quite frankly -- so let's  
4 start with Darden. And you all add to that by agreement and  
5 tell me why. And then if the government -- for whatever  
6 Government reasons the government has, you can put that on a  
7 side additional request. And I'll segregate that from the  
8 Court.

9                   I'll look at it. I'll read it. I'll consider it.  
10 But I think we probably covered all that before. You can  
11 tell me why we should change it now.

12                  MR. SCHRADER: And I don't disagree with the  
13 Court. I mean, I guess -- I don't know whether the Court has  
14 in mind a set of instructions to issue in this case or plans  
15 to, you know, put them together at some point.

16                  THE COURT: Well, I'm telling you, quite frankly,  
17 I do. It's the Darden ones. I'm not hiding that at all.

18                  MR. SCHRADER: And I guess from my perspective, if  
19 there were a set of instructions the Court said, "This is  
20 what's going to be issued" -- I guess the Court's saying it's  
21 the Darden instructions. But, you know, we have a different  
22 defendant here, different charges. I understand what the  
23 Court wants us to do.

24                  THE COURT: I'm not saying don't tell me. Go  
25 ahead and tell me additional things. But just segregate

1 that. Give me a side filing of that.

2 MR. SCHRADER: Okay. All right. We'll do our  
3 best.

4 THE COURT: All right. Anything else?

5 MR. EVANS: No, Your Honor.

6 THE COURT: Anything we've discussed so far?

7 MR. BRUNO: No, Your Honor.

8 THE COURT: All right. So what's left here are  
9 the outstanding motions in limine and then the motion of  
10 Mr. Hardison about additional overt acts.

11 Is there anything else that the government thinks  
12 we need to address here other than those two items?

13 MR. SCHRADER: I don't believe so, Your Honor.  
14 No, sir.

15 THE COURT: Okay.

16 MR. EVANS: Your Honor, there is one issue related  
17 to Mr. Hardison, and that's -- kind of under that umbrella,  
18 there's a couple of different things. One is to update the  
19 Court, through coordinating with the marshals further, his  
20 eye exam, I've been notified, pursuant to the Court's order,  
21 was -- is scheduled for the second week of October.

22 And it's my understanding -- and I heard back from  
23 Mr. Withers on this. I'm looking at my email so I can tell  
24 you the correct date. He emailed me on Friday,  
25 September 3rd, in response to my -- in response to my inquiry

1 after the Court's order. I believe that's when it was. And  
2 said it's the second week of October.

3 I then responded to him on September 7th and said  
4 is there any way that that can be moved sooner? I'm very  
5 concerned about him being able to prepare for trial and  
6 having glasses in time for trial.

7 And then I was -- I got a response email later  
8 that day from Mr. Withers that said he was aware of the  
9 Court's order, and that there was absolutely no way for that  
10 to be moved up. His exact words were, "There are no other  
11 corners that can -- that I can cut."

12 So I wanted to inform the Court on that.

13 THE COURT: What day on the second week? Are you  
14 talking about the 11th, the 12th or --

15 MR. EVANS: The email just says "the second week"  
16 specifically. And I don't think they'll give -- for security  
17 reasons won't give us -- won't inform us of the exact date  
18 because of the day of transport.

19 THE COURT: And help me -- I know it's an eyeglass  
20 issue. Eyeglasses for what?

21 MR. EVANS: He -- so he needs them to be able to  
22 see the jurors and to be able to see documents, to be able to  
23 visually see around the courtroom.

24 I know he's indicated that -- we were talking  
25 today, and the juror seats are a little blurry to him. He

1 also is struggling with document review as well.

2 THE COURT: Okay. That's a problem.

3 MR. EVANS: And the second issue --

4 THE COURT: Well, let's --

5 MR. EVANS: Oh.

6 THE COURT: What's your proposed solution to the  
7 first one?

8 MR. EVANS: Well, I didn't know if Your Honor  
9 wanted to hear all the issues first.

10 The proposed solution is -- the only one is that I  
11 don't have an actual solution other than if we can make it  
12 sooner, if there's a way to cut the corner that he says can't  
13 be cut. And it just baffles me that, with the entire force  
14 of the federal government behind them, they can't get an eye  
15 exam done for someone awaiting a trial for their life,  
16 essentially, in a sooner amount of time.

17 THE COURT: Okay. What's the next issue?

18 MR. EVANS: The next issue is Mr. Hardison is  
19 currently at Daviess County. He's being housed there. And  
20 your court -- Your Honor knows that that -- probably that  
21 that jail is shut down to any visits.

22 And then we had an issue that MS. KINKADE was --  
23 was very instrumental in helping resolve what I had emailed  
24 out to the marshals again about whether or not Mr. Hardison  
25 would even be able to attend today, based on their moratorium

1 on transporting defendants. And I appreciate her efforts and  
2 the marshals' efforts in getting him here today.

3                   The question becomes him being available for  
4 preparation. And right now we have no availability for  
5 preparation. Daviess County does not have -- when I've  
6 asked, at least, they don't even have a videoconference  
7 option.

8                   We had originally discussed having Mr. Hardison  
9 moved closer to -- actually, to DDC, in preparation for  
10 trial, and had hoped that would be done. I had requested  
11 that as well from the marshals. And have followed back up  
12 with Mr. Withers prior to today about that, can he be moved  
13 so we can prep.

14                   And the response that -- the paraphrased response  
15 was, essentially, he can't be -- they would look to see if  
16 they had a room or a bed space at DDC, but that, if he got  
17 moved, he wouldn't be able to have an eye exam because the  
18 eye exam is set through Owensboro, and that that would mess  
19 that up.

20                   And so he kind of put it back to me in a Catch-22  
21 form. And so neither option is -- is acceptable for  
22 Mr. Hardison going forward in order to ensure that he is  
23 prepared and can actively participate in his own defense.

24                   THE COURT: All right. Mr. Schrader, do you want  
25 to add anything?

1                   MR. SCHRADER: No, sir.

2                   THE COURT: Well, let's take a break. There's no  
3 question that Mr. Hardison has to participate in preparation  
4 of his defense for trial. He's entitled to that. And the  
5 Constitution guarantees that. I have no reason and basis to  
6 question what an officer of the court, Mr. Evans, has said to  
7 me. I don't like the options I'm looking at here. So I  
8 would like to get this fixed sooner than later.

9                   Kelly, call Vicki and have her come back to the  
10 courtroom.

11                  So I'm going to ask MS. KINKADE to come back. I'm  
12 going to take a -- a -- we're going to recess here, and ask  
13 Mr. Schrader and Mr. Collins and Mr. Evans and Mr. Bruno,  
14 with Ms. Kindade's guidance, maybe you all go and visit  
15 whoever needs to be visited and tell them we have been  
16 planning for a long time to start this case on the 18th.  
17 I've got 93 people waiting to come and be jurors. You've got  
18 50 witnesses. You've got proof. And the Court's ready to  
19 go. I have nothing else on my calendar but this. Our  
20 ability to start on the 18th is now jeopardized because of  
21 these issues. And I'm hoping that you all can explore a  
22 solution that keeps this case on track.

23                  Even for jury selection, the jury needs to see  
24 Mr. Hardison. Mr. Hardison needs to see the jury. Those are  
25 the peers who are going to come in and determine whether or

1 not the government has carried it's burden of proof on the  
2 charges before the Court. His ability to confront witnesses  
3 is compromised if he cannot see them.

4 So we need to get this fixed. And we'll go -- and  
5 we've got time. I don't think we're going to need to get  
6 together tomorrow.

7 Do you, Mr. Schrader?

8 MR. SCHRADER: No, Your Honor.

9 THE COURT: I'm ready to rule on all the  
10 outstanding stuff. What -- what does Mr. Evans -- do you  
11 think -- I don't know what we would get together to talk  
12 about tomorrow.

13 MR. EVANS: Your Honor, I don't have anything I  
14 can imagine we would need to talk about tomorrow.

15 MR. SCHRADER: And, Your Honor, on the eyeglasses  
16 issue with Mr. Hardison, the government agrees in the sense  
17 that we're -- I mean, we're obviously going to be ready for  
18 trial on the 18th. We want that to happen. I --

19 THE COURT: And the jury --

20 MR. SCHRADER: We can beg, borrow, and plead the  
21 marshals --

22 THE COURT: The jury -- the jury -- you heard me  
23 tell you all, we asked the jury -- or rather we told the  
24 jury, if this bleeds over into Thanksgiving, we'll have that  
25 week off. And then we'll come back. But I told them also

1 the Court would endeavor to have this case resolved because  
2 the government represented to me four to six weeks, closer to  
3 four, than to six.

4 I'm sorry.

5 MR. SCHRADER: I know who it is we, you know,  
6 should make a phone call to.

7 THE COURT: Okay.

8 MR. SCHRADER: But we may be coming back to the  
9 Court and saying would you make a phone call.

10 THE COURT: No. I might make an order, though.  
11 Past experience has taught me that orders are taken more  
12 seriously than attempts to do otherwise.

13 MR. EVANS: And I'm not exactly sure, you know,  
14 what's the issue of the delay, if it's personnel, if it's --  
15 you know, if it's getting funding. You know, I'll pay for  
16 his eye exam if that gets us to start on the 18th. I'm fine  
17 with that. I have no problem with that. I'd take him to  
18 Lenscrafters right now if the Court would let me.

19 MR. SCHRADER: I'll split the bill.

20 MR. EVANS: So -- but I'm absolutely happy to --  
21 to -- for us to go with MS. KINKADE and -- they're not going  
22 to want to see me coming. I've become the fly in the  
23 ointment for the marshals.

24 THE COURT: Well, there's another way we could do  
25 this.

1                   Have we found her yet? Okay.

2                   The other way I can do it, I could ask one of the  
3 deputy marshals there to summon Mr. Withers here and y'all  
4 can talk to him in the recess. Can you -- can you get  
5 Mr. Withers and/or Mr. King? How about having Mr. King and  
6 Mr. Withers come up to the courtroom.

7                   MARSHAL: Yes, sir.

8                   THE COURT: All right. So y'all can wait here.  
9 Excuse me. And, you know, if you want privacy, go in a  
10 corner over there or something. That might -- that might --  
11 and that way, if you can't get a plan, then everybody will be  
12 here and I'll take a try at it.

13                   So, while we're on that issue, though -- and I  
14 can -- Mr. -- so let's -- you all go ahead and summon them.  
15 Use your phone for that.

16                   But, Mr. Hardison, have we made provisions for  
17 clothes?

18                   MR. EVANS: So -- yes, Your Honor. We're  
19 discussing that. And we're actually going to take some -- a  
20 couple of measurements while we have him, since we have him  
21 in person. But, yeah, we've been talking with Mr. Hardison,  
22 coordinating with the family. We're going to have him just  
23 fine on clothes.

24                   THE COURT: Okay.

25                   And, Mr. Hardison, I appreciate that you may not

1 have had a chance to look at everything, but, nevertheless,  
2 have you had an opportunity to talk to your lawyers about  
3 trial preparation?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And ask them questions about trial  
6 preparation?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Have the questions that you've been  
9 asking included discussion about your constitutional right to  
10 not testify at trial?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And have you explored with them the  
13 advantages and the disadvantages or the strengths or  
14 weaknesses or the pluses or the minuses of testifying or not  
15 testifying?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: And are they giving you answers that  
18 resonate with you, that you understand?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And when they do -- when their answers  
21 are less than clear, do you let them know that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And, on other trial preparation  
24 matters, when their answers are less than clear, do you let  
25 them know that?

1                   THE DEFENDANT: Yes, sir.

2                   THE COURT: Do they seem receptive to your  
3 requests for clarification?

4                   THE DEFENDANT: Yes, sir.

5                   THE COURT: And, more importantly, do they, in  
6 fact, provide clarification when you need clarification?

7                   THE DEFENDANT: Yes, they do.

8                   THE COURT: You understand you'll have -- you'll  
9 make the decision on whether you testify or not testify in  
10 this case?

11                  THE DEFENDANT: Yes, sir.

12                  THE COURT: Taking into consideration what the  
13 professionals or what -- in this case, your lawyers, have  
14 told you?

15                  THE DEFENDANT: Yes, sir.

16                  THE COURT: So any communication issues at all  
17 between you and Mr. Bruno or Mr. Evans?

18                  THE DEFENDANT: No, sir. Just -- like I said,  
19 like he stated, just not them coming to see me.

20                  THE COURT: So y'all need to take that up. So  
21 we'll have -- MS. KINKADE is here. We've asked for the  
22 marshal and Mr. Withers to come up. Basically, we've got an  
23 issue -- that I might add MS. KINKADE had already -- she's  
24 well aware of the eyeglass issue and the need for him to be  
25 closer to his lawyers to prepare for trial.

1                   I've already told the lawyers, and you all can  
2 share with the marshal's office, if we can't get this  
3 straight, our starting on the 18th is in jeopardy. And we're  
4 going to start. But it may not -- on the 18th, which impacts  
5 our 93 people, the witnesses, the lawyers. So we really need  
6 to get a solution of this so we can keep the 18th as the date  
7 to proceed.

8                   I apologize, Mr. Hardison.

9                   So, do you have any complaints whatsoever about  
10 your attorneys' services on your behalf to this point in  
11 time?

12                  THE DEFENDANT: No, sir.

13                  THE COURT: So MS. KINKADE is in the courtroom.  
14 We're waiting on the marshals office. We'll be in recess,  
15 and then we'll come back and I'll address the overt acts,  
16 I'll address the motions in limine.

17                  And I'm -- and I assume y'all are talking. You  
18 may have some things you want me to follow up. But I don't  
19 think we'll get together tomorrow. Unless, I guess, we have  
20 to get together and get this issue resolved further.

21                  Okay. Thank you.

22                  (Recess.)

23                  THE COURT: All right. Be seated.

24                  So, Mr. Schrader, Mr. Evans, do you all want to  
25 report on where we are?

1                   MR. EVANS: Yes, Your Honor. We had an  
2 opportunity to speak with Mr. King and Mr. Withers. They  
3 came into the courtroom. MS. KINKADE was gracious enough to  
4 come in as well. And we had a group discussion.

5                   It's my understanding from talking to the marshals  
6 that they are going to -- given us their word they're going  
7 to work in good faith on making some calls today with the  
8 jail to see if they can -- where he's at now, at Daviess, to  
9 see if they can actually give permission -- you know,  
10 exceptional permission for counsel to come in and have  
11 in-person meetings, up to three meetings a week, eight hours  
12 a day, up until the trial date. And they're going to report  
13 back to us today on whether or not that's possible.

14                  As to the glasses, they have indicated that they  
15 are going to make calls today to see if they could get that  
16 date moved up.

17                  THE COURT: And who is "they"?

18                  MR. EVANS: Mr. King and -- and Mr. Withers.

19                  THE COURT: All right. So I guess the jury's out.  
20 So why don't we all get together again at 9:00 in the  
21 morning, and you can report on where we stand, either things  
22 worked out or things need some more help.

23                  MR. EVANS: Yes, Your Honor.

24                  THE COURT: Okay.

25                  All right. Mr. Schrader?

1                   MR. SCHRADER: Nothing on that issue. I don't  
2 know if the Court is going to rule on the pending motions.

3                   THE COURT: I am indeed.

4                   MR. SCHRADER: Okay. Very good. Thank you.

5                   THE COURT: I mean, anything else on this issue?

6                   MR. SCHRADER: No, sir.

7                   THE COURT: But we'll all get together in the  
8 morning so we can get a report on where we are, and hopefully  
9 things will have worked out.

10                  So let's take up the defendant's motion --

11 Document Number 18-21, Defendant's motion to exclude  
12 additional overt act evidence. And then you all may want to  
13 pull up -- to follow my rulings -- I've read everything --  
14 Document Number 18-13, notice regarding additional overt  
15 acts. And, in preparation for the rulings, I've reviewed  
16 Mr. Hardison's motion, Document 18-21; the government's  
17 response, Document 18-28; Mr. Hardison's reply to the  
18 government's response, Document 18-40.

19                  Do you all have that document, 18-13?

20                  MR. EVANS: Yes, Your Honor.

21                  THE COURT: Does the government have that?

22                  MR. SCHRADER: Yes, Your Honor.

23                  THE COURT: Okay. Well, I've read everything.  
24 You've responded. And I'm just going to go into the issues  
25 and give you a ruling. I'm going to start on page 4, in what

1 you all have called Category Number 1, acts of alleged  
2 violence involving obstruction of justice, murder, assault,  
3 witness intimidation, specifically involving Mr. Hardison.

4 And, Number 1, the first such overt act occurs on  
5 page 4.

6 And, having read everything and applying the  
7 applicable law, I'm going to allow Number 1. I think that's  
8 within the scope of the RICO, as well as conspiracy. And  
9 specifically involves allegations regarding Mr. Hardison.

10 The same for Number 2.

11 Number 3 will be allowed because it's included in  
12 the fourth superseding indictment.

13 Same is true for Number 4.

14 And 5.

15 Number 6 will be allowed because it involves  
16 alleged weapon possession.

17 I'm going to exclude 7, 8, 9, because they are  
18 more -- pertain more to an alleged domestic dispute and show  
19 no relationship to either the RICO allegations or conspiracy.

20 10 will be allowed because it's in the fourth  
21 superseding indictment.

22 And the same is true for Number 11.

23 12 will be allowed, as it pertains to the gang  
24 activity and reputation of the gang.

25 Number 13, 14, 15, 16 will all be held in abeyance

1 pending discussion about the motion regarding Josh Harris --  
2 I mean, Josh -- Josh Henry.

3 Number 17 will be allowed because it pertains to  
4 alleged gang smashing.

5 And the same -- same -- 18 and 19 will be allowed.  
6 18, alleged witness tampering, and 19, attempted witness  
7 tampering.

8 That takes me to Category 2, additional overt acts  
9 related to drug trafficking, firearms trafficking, and  
10 illegal gun possession, specifically, again, involving  
11 Mr. Hardison.

12 Number 1 on page 12 will be allowed, as it  
13 pertains to drug trafficking.

14 Number 2 will be allowed, as it pertains to  
15 alleged firearms for gang activity, availability of firearms.

16 As Number 3 is presented to the Court, it will not  
17 be allowed because it doesn't give me a date to determine it  
18 falls at all within the allegations in the indictment, or  
19 otherwise Mr. Hardison would have been not in custody. So  
20 Number 3 is not allowed.

21 Number 4 is allowed. It's in the fourth  
22 superseding indictment.

23 Number 5 and 6 both pertain to firearms and will  
24 be allowed.

25 Same is true for 7.

1                   8 involves drug distribution, alleged, and it will  
2 be allowed.

3                   The -- Number 9 is in the -- Number 9 is a subject  
4 of a motion in limine. So I'll put that on hold.

5                   And that takes me to Category 3, additional overt  
6 acts not specifically involving Mr. Hardison, but which  
7 potentially constitute *Giglio* material for testifying  
8 witnesses. Here, the Court's hampered because I don't have a  
9 witness list to determine that. But, as I'll explain, I'm  
10 going to rule.

11                  In general, my disallowance of some of these overt  
12 acts is because of no connection to Mr. Hardison or it  
13 appears Mr. Hardison was in custody and there's no facts  
14 presented to the Court from which the Court can make a  
15 reasonable inference that Mr. Hardison had any engagement,  
16 direction, to the alleged overt act. In other words, I can't  
17 connect him being in custody to the overt act to allow it in  
18 the trial.

19                  The Court notes the dates that he -- that has  
20 presented that he was in custody. That doesn't preclude that  
21 these overt acts could have been directed by him. The Court  
22 is simply saying that, without some factual predicate for  
23 that, I -- I'm going to disallow them at this stage.

24                  So now I'll go through each one of those.

25                  The rationale I just expressed applies for Number

1 1; that will be disallowed, and 2, because it appears  
2 Mr. Hardison was in custody.

3 Number 3 I'm going to put in hold. I have  
4 maybe -- it appears that Danyon Dowlen is going to be a  
5 witness, and Number 3 could constitute *Giglio* material if he  
6 testifies. I guess I'll know that once I see the  
7 government's witness list, unless the government wants to go  
8 ahead and state now affirmatively that he will be called on  
9 your will-call witness list.

10 MR. SCHRADER: He will be called as a witness,  
11 Your Honor.

12 THE COURT: So that can be used as *Giglio*.

13 Number 4 will be disallowed because Mr. Hardison  
14 was in custody.

15 Number 5 is a period of time where Mr. Hardison  
16 could have been out of custody, based on the information  
17 known to the Court, but I'm going to disallow it because of  
18 the vague last sentence, "Russian was killed later that day  
19 in an unrelated incident." Given that assertion, it's -- the  
20 Court can't engage in an inference or reasonable inference to  
21 tie it to this case.

22 Numbers 6, 7, 8, will be disallowed because the  
23 period of time here between 2005 and '18 is simply too broad  
24 for the Court to come to the conclusion that that should be  
25 fairly included, given the allegations in the fourth

1 superseding indictment or -- and/or under 403 analysis for  
2 undue prejudice.

3 The same will be true and excluded for 9, 10, 11,  
4 and 12. All of those will be excluded.

5 Number 13, 14, and 15 is -- as well as 16, 17, and  
6 18, all pertain to a time period that appears Mr. Hardison  
7 was in custody, and, for the reasons just explained earlier,  
8 it's not sufficient information for the Court to engage in an  
9 inference to tie him to those allegations.

10 I'm going to exclude 19 under 403, as well as --  
11 based on what the Court knows to this point, appears to be  
12 cumulative.

13 Number 20 is allowed because it connects back to  
14 Dowlen.

15 21 is allowed.

16 22 is disallowed because of the inability to  
17 identify a date certain for the Court to consider.

18 23 is disallowed because Mr. Hardison was in  
19 custody.

20 For 24, 25, and 26, appear to be at a time that  
21 Mr. Hardison was not in custody. However, I'm going to  
22 preliminarily exclude them subject to the government raising  
23 it during trial if a connection can be made. They could  
24 pertain to the RICO conspiracy, although the Court wants to  
25 hear how it presents at trial, because it could also be

1 cumulative or otherwise excludable under 403.

2 So 24, 25, 26, preliminarily excluded.

3 Number 27 is excluded based on what's presented.

4 Simply no connection to the RICO allegations or, for that  
5 matter, Mr. Hardison.

6 28 is allowed.

7 29 is disallowed based on everything the Court has  
8 heard in the prior trial and the writings I've had on this  
9 issue. Again, the government can raise that again if  
10 necessary.

11 30 is disallowed because it's too broad and vague.

12 31, 32, 33, and 34 all pertain to times where it  
13 appears Mr. Hardison was back in custody. The Court also  
14 notes these could be cumulative or otherwise excluded under  
15 403.

16 Same -- Mr. Hardison was also back in custody for  
17 35, 36, 37, 38, 39, and 40, 41, 42, and 43. And without more  
18 information the Court has to exclude those.

19 All right. That takes us to the motions in  
20 limine.

21 MR. SCHRADER: Your Honor. Sorry. Could I ask a  
22 question about -- really about one of those in particular,  
23 but I think it kind of pertains to a group of those  
24 additional overt acts.

25 So Overt Act Number 27, it says (as read):

1                   On or about September 18th, 2012, Charles Sims  
2                   a/k/a TuTu was shot and killed in Clarksville,  
3                   Tennessee.

4                   Mr. Dowlen is the one who shot and killed Mr.  
5 Sims. And the reason it is included on this list here --  
6 it's not necessarily because it has any connection to the  
7 RICO conspiracy, although Mr. Dowlen testified at trial that  
8 Mr. Darden helped him disassemble a gun after that murder and  
9 then helped him flee the jurisdiction afterwards. But it's  
10 included here in part because I expect that it will be a  
11 topic of cross-examination at trial.

12                  THE COURT: All right. I'll allow that as  
13 potential *Giglio*.

14                  MR. SCHRADER: And I -- the same is true for a  
15 number of these other issues. And I don't know exactly how  
16 to raise that with the Court, except maybe in a supplemental  
17 filing.

18                  THE COURT: Yeah. And that gives the defense a  
19 chance to respond to it.

20                  MR. SCHRADER: And I'm happy to do that, just kind  
21 of maybe put a little more meat on the bones in terms of  
22 identifying folks.

23                  THE COURT: Well, I don't have your witness list.  
24 And that's -- that was a problem.

25                  MR. SCHRADER: Sure. And, you know, it would be

1 one thing if the defense weren't going to cross-examine  
2 Mr. Dowlen on that, but I'm confident they're going to want  
3 to cross-examine him on that.

4 THE COURT: There's much to cross-examine  
5 Mr. Dowlen on.

6 MR. SCHRADER: There is. But we obviously are  
7 entitled to introduce that during his direct to take the  
8 sting out. So. . .

9 THE COURT: All right. Anything from the defense?

10 MR. EVANS: No, Your Honor.

11 THE COURT: All right. So let's go to the motions  
12 in limine.

13 I'm going to start with the government's Motion in  
14 Limine Number -- well, Document Number 18-65, the  
15 government's motion to permit introduction of certain medical  
16 records.

17 Again, I've read the government's motion; I've  
18 read Mr. Hardison's response; I've read the replies, which  
19 were all good reads. And the Court rules as follows:

20 Regarding the medical records, Document Number  
21 18-65, subject to a timely objection on other evidentiary  
22 basis, the motion is granted.

23 Document 18-67, pertaining to introduction of  
24 certified copies of state and federal court judgments, again,  
25 we're going to get to this -- well, again, I'm going to grant

1 the motion, subject again to any timely objection for  
2 exclusion on other evidentiary basis, including but not  
3 limited to relevancy.

4 Document 18-78 is the government's motion in  
5 limine to admit certain business records. And I'll make the  
6 same ruling. It's granted, subject to a timely objection at  
7 trial on other evidentiary basis, including relevancy.

8 Let's skip Document Number -- let's skip Josh  
9 Henry. We'll come back to Josh Henry.

10 So that's -- that's all of the government's,  
11 except we've got Government's motion to preclude inquiry as  
12 to witness location and participation in the federal witness  
13 security program regarding DeZorick Ford.

14 I need a response from the defense.

15 MR. EVANS: Yes, Your Honor. We just haven't --  
16 we actually discussed that yesterday during our meeting. And  
17 we can -- I can have that response to Your Honor, if it's  
18 appropriate, by Monday.

19 THE COURT: Okay. That will be October the 4th.

20 Does the government want to file a reply?

21 MR. SCHRADER: Yes, Your Honor. Just a couple of  
22 days to reply. So a couple of days after that will be fine.

23 THE COURT: October 6th?

24 MR. SCHRADER: Yes, Your Honor.

25 THE COURT: October 6th for the government's

1 reply.

2                   Are there any other government motions outstanding  
3 other than Josh Henry?

4                   MR. SCHRADER: I don't believe so, Your Honor.

5                   THE COURT: Okay.

6                   So that takes me to Mr. Hardison's Motion in  
7 Limine Number 1, Document Number 1874, which is granted only  
8 on a limited part regarding the notice of enhanced sentencing  
9 factors and otherwise denied. It's clear under Sixth Circuit  
10 authority that the government is entitled to prove the  
11 language in the indictment, and thus would not qualify as  
12 surplusage -- surplus.

13                   Mr. Hardison's Motion in Limine Number 2 to  
14 exclude any evidence of Mr. Hardison's prior federal  
15 convictions for being a felon in possession -- and I think  
16 that's related -- well, let's just stop there.

17                   So I guess on this I need some discussion. Either  
18 the government can prove he's a felon or you can stipulate to  
19 that.

20                   MR. BRUNO: I don't know that that's the issue. I  
21 don't know whether or not he's a felon is the issue.

22                   The government is wanting to get in evidence, I  
23 believe, that he, in fact, possessed the weapon as part of an  
24 overt act. And so what my particular objection -- if they --  
25 if the Court is allowing them to say, okay, you can put on

1 evidence as part of an overt act that he, you know, possessed  
2 the weapon, that's one thing, if they have a witness or  
3 something along those lines.

4 What I think should be prevented is the fact that  
5 he pled guilty to the offense and that there is a conviction  
6 for the offense. That's -- that's separate.

7 THE COURT: I appreciate -- Mr. Schrader? Do you  
8 want to go further than just prove the possession?

9 MR. SCHRADER: In order to -- well, the overt act  
10 alleges possession of the firearms. And the evidence of  
11 possession of those firearms includes Mr. Hardison's guilty  
12 plea to that offense. And so we'll be proving in part that  
13 he pled guilty to that conduct. There's no better evidence  
14 that he possessed those firearms than that he pled guilty to  
15 having done so.

16 THE COURT: Well, how are you going to -- what  
17 witness -- are you going to present a witness to testify that  
18 when -- that he -- I can't find the date. There's a date  
19 certain that he actually possessed a specific firearm?

20 MR. SCHRADER: Yes, Your Honor. So it will be  
21 sort of a combination of evidence. There will be testimony  
22 about the underlying facts of the conviction itself. And  
23 there are photographs substantiating his possession of those  
24 firearms, and then the judgment of conviction, as well.

25 THE COURT: Why do you need the judgment of

1 conviction?

2 MR. SCHRADER: In part -- well, just because it's  
3 evidence of that particular act. In other words, he pled  
4 guilty to that offense. You know, part of what the jury  
5 might be wondering is what it is he actually pled guilty to.  
6 And because it's not illegal just to possess a firearm. It's  
7 illegal to possess one if you are a prohibited person.

8 THE COURT: All right. Well, I think what's  
9 really relevant is you prove in your overt act, which you're  
10 entitled to do, in presenting witnesses and/or documents that  
11 show on the date you allege he, in fact, had possession,  
12 constructive or actual of this firearm.

13 And then it's up to the jury to decide how to use  
14 that overt act in the overall allegations in the fourth  
15 superseding indictment as part of the RICO conspiracy or  
16 otherwise. So I'm going to allow you to prove that without  
17 the conviction or the plea.

18 MR. SCHRADER: That's the best evidence of that  
19 act, though.

20 THE COURT: No, it's not. It's the witness you're  
21 going to put on -- it's the witness you're going to put on,  
22 whether or not it's believable.

23 And, while we're at it, that's going to apply to  
24 Motion in Limine Number 3 as well, Document 18-76. You can  
25 certainly put on evidence that on the day he was arrested he

1 had possession of a pistol and marijuana, and maybe this --  
2 but -- but nothing further -- to prove up your overt act.

3                   So I'm allowing the government to present, well,  
4 direct -- could be direct evidence -- present evidence,  
5 period, to prove its overt act, but not go and I think usurp  
6 the role of the jury on -- with the conviction.

7                   Also, I believe under 403 that would be unduly  
8 prejudicial to Mr. Hardison.

9                   And the same ruling applies to Motion in Limine  
10 Number 3. You can prove the XD 9 mm pistol and the  
11 marijuana, and that's what your overt act alleges, but  
12 nothing further.

13                   So that takes me to Motion in Limine Number 4,  
14 Number 18-77.

15                   So help me now, Mr. -- Mr. Schrader. You can  
16 obviously present what was found in the -- you can talk about  
17 the consent to search. What I do have trouble with is the  
18 discovery. I don't think that qualifies as a public  
19 document.

20                   MR. SCHRADER: And, Your Honor, this is actually a  
21 matter that Mr. Collins --

22                   THE COURT: Okay.

23                   MR. SCHRADER: If you can hear Mr. Collins.

24                   MR. COLLINS: Good morning, Your Honor.

25                   THE COURT: Good morning.

1                   MR. COLLINS: Your Honor, as we stated in our  
2 filing, we believe that this evidence is both relevant and  
3 intrinsic to the charges as we've outlined in most of our  
4 filings, that this is an organization that uses fear and  
5 intimidation to try and get witnesses not to be involved in  
6 investigations and prosecutions.

7                   And, specifically as it relates to this incident,  
8 we know that discovery was passed around as it relates to the  
9 incident with Mr. Hardison possessing these guns. And  
10 that -- that discovery was then used by other associates of  
11 Mr. Hardison to intimidate witnesses, to put them on -- or  
12 put their information out to the public so that it was known  
13 that they cooperated as it related to this investigation.

14                  And, when I say "this investigation," I mean the  
15 firearm investigation. We believe that the fact that this  
16 discovery -- this specific discovery -- was found at  
17 Mr. Kilgore's house supports this belief that the Gangster  
18 Disciples used this tactic, that they provide discovery to  
19 other individuals; these other individuals then use the  
20 discovery to intimidate witnesses, and that's why we want to  
21 introduce this specific discovery.

22                  THE COURT: Right. But that necessarily is going  
23 to require us to explain or require the government to explain  
24 what is discovery, how does -- what is -- and -- and  
25 inevitably, you're going to have to say there were other

1 charges pending.

2 MR. COLLINS: So, Your Honor, I do believe that we  
3 will have witnesses who are able to testify generally as to  
4 what discovery is. And, like --

5 THE COURT: I'm more concerned about the charges  
6 underlying why he had the discovery. That's where the  
7 prejudice comes in.

8 MR. COLLINS: You mean the charges that stem  
9 from --

10 THE COURT: Stem from the discovery he had in his  
11 possession.

12 MR. COLLINS: Well, Your Honor -- let me say this,  
13 Your Honor, we have evidence -- and we provided this to the  
14 defense -- where documents from this specific packet of  
15 discovery was posted online. And it created discussion about  
16 the witnesses.

17 And so I think -- I think there might even be a  
18 way, Your Honor, where -- and I don't think the government is  
19 opposed to this at all. We could limit some of the discovery  
20 to -- to replicate some of the items that were actually  
21 posted online, or there might be a way to redact some of that  
22 discovery.

23 But we think that the introduction of the  
24 discovery -- to show the connection that he had this specific  
25 case, that the materials from this case was passed around to

1 other members and associates, that documents from that that  
2 were passed around were posted online, I think that's  
3 important to make that connection.

4 And we're going to have witnesses, Your Honor,  
5 that are -- who are -- who are other defendants -- or  
6 co-defendants who have videos where they show and explain  
7 that this is their practice, this is what they do.

8 And that's the importance of trying to have this  
9 discovery be admitted, so the jury can make the legitimate  
10 connection to what these documents are.

11 THE COURT: Sure. Well, let me share where I am.  
12 I think under 403 it's unduly prejudicial to get into the  
13 2013 investigation, because that necessarily has -- you're  
14 going to have to explain to the jury, what was that about,  
15 well, what happened in the 2013, and we're not here to -- to  
16 relitigate that issue.

17 So I'm going preliminary grant that motion, but if  
18 you all -- but you can raise it at trial at one of our 4:30  
19 hearings.

20 MR. COLLINS: Thank you, Your Honor.

21 THE COURT: So I think that takes care of all  
22 defendant's motions?

23 MR. EVANS: Yes, Your Honor.

24 THE COURT: So the only thing left on the table  
25 now is Mr. Josh Henry.

1                   So the first thing I need to take up is the  
2 government's motion for leave to late file Document 18-80.  
3 And, turning to that document, in particular, page 2, Item 3,  
4 the government argues -- or represents as follows, quote (as  
5 read):

6                   Unfortunately, despite its best efforts, the  
7 government was unable to complete the  
8 above-described motion in limine prior to the  
9 previously set deadline. That is because the  
10 government could not obtain the statement of an  
11 essential witness who observed and/or heard many  
12 of the allegations asserted in the motion in  
13 limine prior to the September 6th, 2021, deadline.

14                   So my first question to the government: Is the  
15 essential witness referenced in paragraph 3 Witness Number 5?

16                   MR. COLLINS: The Court's indulgence, Your Honor.

17                   THE COURT: I'm sorry?

18                   MR. COLLINS: I said the Court's brief indulgence,  
19 Your Honor.

20                   THE COURT: Oh, sure. And then maybe before you  
21 answer you want to go and look at Footnote 1 on page 9 of  
22 Document 18-89.

23                   MR. COLLINS: That is correct, Your Honor. It is  
24 Witness Number 5.

25                   THE COURT: And what is Witness Number 5's name?

1                   MR. COLLINS: I'm sorry, Your Honor?

2                   THE COURT: What is Witness Number 5's name?

3                   MR. COLLINS: Your Honor, her last name is  
4 Pasquale.

5                   THE COURT: Spell it.

6                   MR. COLLINS: P-a-s-q-u-a-l-e.

7                   THE COURT: Q-u-a-l-e.

8                   And the first name?

9                   MR. COLLINS: Autumn, A-u-t-u-m-n.

10                  THE COURT: Now, so I have your representation now  
11 about Witness Number -- and I can connect it to the argument.

12                  Did the government have any contact with  
13 Ms. Pasquale between May of 2013 and June of 2021?

14                  MR. COLLINS: No, Your Honor, we did not.

15                  Your Honor, I can provide some greater clarity, if  
16 that's okay.

17                  THE COURT: Sure.

18                  MR. COLLINS: So, Your Honor --

19                  THE COURT: And I'm trying to find the good cause  
20 to allow your motion. It's late.

21                  MR. COLLINS: Sure. Sure, Your Honor.

22                  This is an incident that the government has  
23 continued to investigate over periods of time. And in 2020  
24 we had an opportunity to speak with another witness, who  
25 is -- who is in -- in this filing, Witness Number 7. And,

1 based off some of the information that Witness Number 7  
2 provided, we were then able to connect the dots to understand  
3 the importance of Witness Number 5's information.

4 And so that -- at that point in time -- or soon  
5 thereafter -- the government made attempts to locate Witness  
6 Number 5.

7 Just in all candor, Your Honor, Witness Number 5  
8 is a somewhat transient witness. We were able to make  
9 contact with Witness Number 5 within the past few months.  
10 And then that became an exchange of Witness Number 5 saying  
11 that they would meet with us, Witness Number 5 not showing  
12 up, Witness Number 5 then becoming very uncooperative,  
13 Witness Number 5 not being able to be located.

14 And, from there, Your Honor, we were able to  
15 establish enough of a record where we were able to get a body  
16 attachment for Witness Number 5 and have Witness Number 5  
17 come in for grand jury so that we could -- that we could then  
18 do a full inquiry and investigation into what Witness Number  
19 5 knows.

20 Your Honor, one of the things that also  
21 complicated this is, of course, the COVID situation that  
22 we're in. For an extensive period of time, there was no  
23 grand jury sitting for us to be able to get Witness Number 5  
24 in earlier than that to secure the type of information that  
25 we would need to be able to present in a trial like this.

1 And so that was another thing that complicated, you know,  
2 trying to have evidence that the government believed would be  
3 significant and substantial enough to support the allegations  
4 that Witness Number 5 was making.

5 THE COURT: Okay. Well, even if all that's  
6 correct, nevertheless, since 2013, you had law enforcement  
7 investigators', plural, interview of Witness Number 5.

8 MR. COLLINS: That's correct, Your Honor.

9 THE COURT: So you knew the essence of Witness  
10 Number 5's personal information about this incident. But it  
11 was -- correct? I mean, they interviewed. So I assume in  
12 interviews -- you had access to that.

13 MR. COLLINS: That is correct, Your Honor.

14 THE COURT: But yet you don't reach out to Witness  
15 Number 5 until almost eight years -- over eight years later?  
16 I'm sorry. Yeah.

17 MR. COLLINS: Well, Your Honor, like I said, once  
18 we could -- when I say "we," I mean the government as it  
19 currently exists in this prosecution team.

20 As we continued to investigate this matter, we  
21 then recognized the connections. And, while we had these --  
22 while we had access to these recordings, Your Honor, I think  
23 the Court is very much aware that the government believes it  
24 has an obligation --

25 THE COURT: What recording --

1                   MR. COLLINS: -- to fully investigate these  
2 matters and to flesh them out before we make --

3                   THE COURT: What are you referring to when you say  
4 "recordings"? Whose recordings?

5                   MR. COLLINS: So there were interviews --

6                   THE COURT: Of Witness Number 5?

7                   MR. COLLINS: Of Witness Number 5. There were  
8 interviews done with Witness Number 5 --

9                   THE COURT: Back in 2013?

10                  MR. COLLINS: That's correct, Your Honor.

11                  THE COURT: They were recorded?

12                  MR. COLLINS: That's correct, Your Honor.

13                  THE COURT: Has that been provided to the defense?

14                  MR. COLLINS: It has, Your Honor.

15                  THE COURT: Okay.

16                  MR. COLLINS: And it's been provided for, I  
17 believe, more than a year before now, or -- or before, Your  
18 Honor. So some of this discovery has been provided to the  
19 defense for in excess of a year, Your Honor.

20                  THE COURT: Okay.

21                  MR. COLLINS: But the point I was trying to make,  
22 Your Honor, is that, even though these recordings, these  
23 interviews had been conducted, there were specific questions  
24 that the government believed that needed to be fleshed out,  
25 especially, Your Honor, before we could make those

1 representations in filings to this Court.

2                   And so that's why the government took the  
3 additional step to make sure that the information that we had  
4 was correct and accurate as possible before we could make  
5 these representations in a filing like this, Your Honor.

6                   THE COURT: The additional step occurring in June  
7 of 2021?

8                   MR. COLLINS: That's correct, Your Honor. That's  
9 correct.

10                  THE COURT: All right. Well, I've read  
11 everything, and I'm going to reserve ruling on whether or  
12 not -- because things are -- things are certainly -- there's  
13 a lack of clarity to the Court about what the government knew  
14 and when it knew it to determine if there's good cause.

15                  Nevertheless, holding that in abeyance, and having  
16 read everything, the Court's persuaded by the -- what I  
17 thought was an excellent opinion by Judge Marbley, and I'm  
18 going to follow that.

19                  And I'm going to convene a hearing, evidentiary  
20 hearing, on -- October the 11th is Columbus Day. But we're  
21 going to get together on October the 12th and/or 13.

22                  How many witnesses, Mr. Collins, are you all going  
23 to call -- we know there's five witnesses, 1 through 5, and  
24 we know there's two -- at least two law enforcement officers,  
25 because you use the plural. So that's seven.

1                   Is that about the right number of witnesses?

2                   MR. COLLINS: So, Your Honor, with the inclusion  
3 of the law enforcement officers, in order to accurately paint  
4 the full picture, we probably need to put on nine witnesses.

5                   THE COURT: All right. Tell me who they are.

6                   MR. COLLINS: The Court's indulgence, Your Honor.

7                   (Respite.)

8                   THE COURT: And just for -- oh, go ahead. I'll  
9 let you all do that.

10                  MR. SCHRADER: Can we have just a moment, Your  
11 Honor?

12                  THE COURT: Sure.

13                  (Respite.)

14                  MR. COLLINS: Your Honor --

15                  THE COURT: Sure. Sure. Go ahead.

16                  MR. COLLINS: Just further thought and  
17 consideration. The government is just going to withdraw this  
18 motion at this time.

19                  THE COURT: I was going to -- that was last on my  
20 list. If you want to abandon this course, we don't need a  
21 hearing.

22                  MR. COLLINS: And just for various reasons, Your  
23 Honor, number one, I mean, I think we've made this very clear  
24 in our representations in all of our filings about the  
25 witness intimidation issue in this case. And the government

1 is not comfortable with identifying each and every one of  
2 these witnesses at this point in time on the record with this  
3 defendant.

4 Too, Your Honor --

5 THE COURT: Well, the witnesses are going to be on  
6 your witness list.

7 MR. COLLINS: That's correct, Your Honor. And I  
8 think at that point in time there are things we can do to  
9 kind of make sure the witnesses are in -- Your Honor has  
10 given us a definite date on when that witness list needs to  
11 be provided. And we can do some things to make sure that  
12 those witnesses are aware and are safe and in a place where  
13 we can provide that information before we give it.

14 THE COURT: And I'm sure the government's aware,  
15 every witness, yours and the defense, are going to come into  
16 the courtroom. It's going to be open to the public.

17 MR. COLLINS: No, we understand that, Your Honor.  
18 We do understand that.

19 THE COURT: Okay.

20 MR. COLLINS: The other issue, though, Your Honor,  
21 that we want to introduce is that -- I'm sure the Court is  
22 very aware from the filing, a lot of the comments or  
23 statements that we wanted to elicit in this filing are made  
24 in conjunction with statements that were made by the  
25 defendant. There are a couple that were independent

1 statements that were not made in conjunction with the  
2 defendant. But the good majority of them were.

3 Your Honor, at this point in time, while we're  
4 withdrawing the motion, we do anticipate in- -- introducing  
5 some of the defendant's statements. There may be a request  
6 to introduce other statements around those so that they can  
7 provide context for the jurors, and at the appropriate time  
8 we'll advise the Court of that.

9 We understand that the Court would have to make  
10 some kind of instruction to the jury to -- to have them know  
11 that the statements that the government is seeking to admit  
12 that are not the defendant's are just for the purpose of  
13 context of the entire conversation.

14 And so I think this is an issue that we would  
15 probably address later on as we move to admit certain  
16 statements of the defendant, Your Honor.

17 THE COURT: Okay. Well, I'm positive I'm not  
18 following everything you've said, but this much I know: I  
19 want the government to go ahead and file, no later than  
20 October -- October the 8th, a notice, a document, that  
21 explains in further detail what you just said.

22 So, number one, if we're going -- if you want to  
23 present this -- I hear the government saying you're  
24 withdrawing your motion for leave to late file this, and  
25 you're withdrawing your motion in limine to admit the

1 statements of Josh Henry.

2 Is that correct?

3 MR. COLLINS: That is correct, Your Honor.

4 THE COURT: Okay. So those motions will be denied  
5 based upon the government's representation to withdraw.

6 However, this should not be used as a back door way of having  
7 a hearing in the middle of trial. If we're going -- if we're  
8 going to present -- if the government's going to present  
9 statements of Josh Henry, we need to go ahead and determine  
10 Mr. Hardison's Sixth Amendment right or not.

11 So, in other words, either we do it in a mini  
12 hearing, which I just think is absolutely required, and I  
13 make that determination by preponderance of the evidence,  
14 Tuesday and Wednesday, the 12th and 13th, or not.

15 Does the government understand?

16 MR. COLLINS: I understand that, Your Honor.

17 THE COURT: Okay.

18 MR. COLLINS: I understand that.

19 THE COURT: And the government is not going to try  
20 to do at trial what I want to do at a mini hearing?

21 MR. COLLINS: No, Your Honor.

22 And, Your Honor, I think --

23 THE COURT: Okay.

24 MR. COLLINS: And, just so it's clear, Your Honor,  
25 for example, there are statements that we introduced in our

1 filing where the defendant is having a conversation with  
2 Joshua Henry. And Joshua Henry --

3 THE COURT: Presumably with other persons present.

4 MR. COLLINS: I'm sorry, Your Honor?

5 THE COURT: I guess presumably Joshua Henry, the  
6 defendant, and others?

7 MR. COLLINS: That's correct, Your Honor. That's  
8 correct.

9 THE COURT: And others are going to come into  
10 court to say what Mr. Hardison said.

11 MR. COLLINS: That's correct, Your Honor.

12 And so there are statements that Mr. Hardison --

13 THE COURT: But others are not going to come into  
14 court to say what Mr. Henry said.

15 MR. COLLINS: Well, Your Honor, the government  
16 would not be seeking to admit those statements for the truth,  
17 Your Honor. What the government would be asking is that the  
18 Court admit them with a limiting instruction for the specific  
19 purpose to show context of the entire conversation.

20 THE COURT: So that's the motion you're going to  
21 file --

22 MR. COLLINS: That's correct, Your Honor.

23 THE COURT: -- by October the 8th.

24 And -- well, since we're not going to have -- why  
25 don't you file that -- can you file that by the -- by the

1 6th? And that way I can let the defendant respond by the  
2 11th, so I can read it, study it, and be ready.

3 MR. COLLINS: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. COLLINS: And, just so it's clear, Your Honor,  
6 that motion would only contain conversations where the  
7 defendant and Mr. Henry were having conversations. It  
8 wouldn't include any conversations that Mr. Henry was having  
9 with someone else. Just so it's clear, Your Honor. That's  
10 what I'm trying to explain to the Court.

11 THE COURT: No. What I want -- what I heard you  
12 to say -- I'm going to read it back -- that the government  
13 will seek to ask the Court to admit statements of others, as  
14 you put it, with a specific purpose to show the context of  
15 the entirety. That's the motion.

16 So I need a motion from the government to admit  
17 statements of others that will provide a context of the  
18 entirety and why that should be admissible. That's the part  
19 that I need help on.

20 MR. COLLINS: I'll have it filed, Your Honor.  
21 Thank you.

22 MR. EVANS: And if Your Honor -- if I may, it  
23 sounds to me like the government's asking to do by a horse of  
24 a different color what they were trying to do initially,  
25 which is get in statements of Josh Henry, not for the truth

1 of the matter.

2 THE COURT: Well, I asked him that specifically  
3 and he said no. And I've made it clear I'm not going to do  
4 that.

5 MR. COLLINS: No. That's what I -- what I said,  
6 Your Honor, is that we would seek to introduce conversations  
7 where the defendant made certain admissions, and those  
8 admissions are made in the presence of other people, and  
9 those admissions elicited responses from Joshua Henry.

10 And so we would be seeking to admit Joshua Henry's  
11 statements in conjunction with the defendant's only to show  
12 the context of the entire conversation.

13 THE COURT: Yeah. That's what we need to have a  
14 mini hearing on then. Because I'm not going to allow any  
15 Joshua Henry comments until I determine whether Mr. Hardison  
16 has forfeited his Sixth Amendment right.

17 MR. COLLINS: So you still want a filing on the  
18 6th that kind of fleshes out --

19 THE COURT: Well, no, I'm back on your motion now.  
20 If that's what you want to do, we need to go ahead with the  
21 hearing so I can have an evidentiary hearing and make a  
22 determination if his Sixth Amendment rights have been  
23 forfeited.

24 MR. COLLINS: Well, Your Honor, we would -- we  
25 would not be having that. We would withdraw our motion, as

1 we've already said, as it relates to the first issue, and  
2 we won't -- we won't address the second issue as I've  
3 presented it to the Court.

4 THE COURT: Okay. But this -- whatever you want  
5 to present regarding Joshua Henry, directly, indirectly, from  
6 the right, from the left, from the up or the down, you need  
7 to file a motion on it. Or, if it's not going to be  
8 anything, just file me a notice saying no need for such a  
9 motion.

10 But whatever you're going to present that relates  
11 to Joshua Henry -- and what Joshua Henry said -- at trial  
12 needs to be presented to the Court by October the 6th with a  
13 response from the defendant by October the 11th. And then I  
14 can read it and, if I don't understand it, we can get back  
15 together.

16 Or you can just file me a notice saying the  
17 government does not intend to present anything that uttered  
18 out of the mouth of Joshua Henry.

19 MR. COLLINS: All right. Your Honor, we'll file  
20 something by the 6th.

21 THE COURT: Okay.

22 Now, does the government believe it's going to  
23 file anything that's going to need a hearing? Because we're  
24 just -- our time is getting short here.

25 Mr. Collins?

1                   MR. COLLINS: No, Your Honor, I don't believe so,  
2 Your Honor, not that will require a hearing, no.

3                   THE COURT: All right. Okay. Well, we've  
4 covered -- any other questions from the government about  
5 anything pertaining to the trial starting on the 18th? Of  
6 course, we'll all get back tomorrow at 9:00. So why don't  
7 you all sleep on it. Have a cup of coffee, think about it  
8 some more. Because I'm going to ask the same question  
9 tomorrow at 9:00. And then we'll get the report back from  
10 the marshal and see where we are.

11                  So I'll see you all at 9:00 in the morning.

12                  Mr. Schrader has something today.

13                  MR. SCHRADER: I always have something, Your  
14 Honor.

15                  Just to make sure this is on the record, we  
16 actually provided yesterday to the defense nearly all of the  
17 exhibits we intend to introduce at trial. So they have  
18 copies of those now for themselves. And I don't know exactly  
19 when we're going to get an answer back, but it's possible we  
20 get one back today -- I think we'll be around the  
21 courthouse -- if it's possible to resolve this today as  
22 opposed to coming back tomorrow.

23                  THE COURT: Well, we may need to come back  
24 tomorrow because, even though I didn't raise it, only because  
25 I forgot, I am concerned if Mr. Hardison's going to have to

1 have a two-and-a-half hour drive from his place of custody to  
2 court every day. That's five hours on the road, first of  
3 all. And we're going to -- we're going to be doing this for  
4 four to six weeks. That's not sustainable for the youngest  
5 of men.

6 MR. SCHRADER: I note that's what happened with  
7 the defendants in the last trial.

8 THE COURT: Yeah.

9 MR. SCHRADER: That was six weeks.

10 THE COURT: It was a problem.

11 MR. SCHRADER: I'm sure it was a challenge.

12 THE COURT: So that needs to get addressed as  
13 well.

14 I had been told, long ago, that he would be moved  
15 closer to Nashville because of that very issue. So everybody  
16 knows that's a serious issue and potentially could impede his  
17 ability to participate in his defense.

18 So let's not create issues. So, Mr. Schrader, I'm  
19 going to charge you and Mr. -- and Mr. Collins, and Mr. Evans  
20 and Mr. Bruno, let's raise that again with the marshal, maybe  
21 this afternoon, and be ready to discuss that tomorrow.

22 Everyone, even the marshals, recognize that's not optimal.  
23 And the Court doesn't think it's fair. He needs to be an  
24 active participant, because the nature of the charges are  
25 very serious.

1           All right. Thank you for everything.  
2           MR. COLLINS: Thank you, Your Honor.  
3           (Court adjourned.)  
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## 1 REPORTER'S CERTIFICATE

2

3           I, Lise S. Matthews, Official Court Reporter for  
4 the United States District Court for the Middle District of  
5 Tennessee, with offices at Nashville, do hereby certify:6           That I reported on the Stenograph machine the  
7 proceedings held in open court on September 30, 2021, in the  
8 matter of UNITED STATES OF AMERICA v. BRANDON DURELL  
9 HARDISON, Case No. 3:17-cr-00124-3; that said proceedings in  
10 connection with the hearing were reduced to typewritten form  
11 by me; and that the foregoing transcript (pages 1 through 84)  
12 is a true and accurate record of said proceedings.

13           This the 23rd day of March, 2023.

14

15                            /s/ Lise S. Matthews  
16                            LISE S. MATTHEWS, RMR, CRR, CRC  
17                            Official Court Reporter

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